Supreme Court, U.S.
FILED
DEC 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-397

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

INDEPENDENT COMMMUNITY BANKERS ASSOCIATION OF SOUTH DAKOTA, INC.,
Petitioner,

v.

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent,

and

FIRST CITY BANCORPORATION OF TEXAS, INC.,
Respondent-Intervenor

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The District of Columbia Circuit

JOINT REPLY OF PETITIONER TO BRIEFS IN OPPOSITION OF THE RESPONDENT AND INTERVENOR

RONALD G. SCHMIDT
SCHMIDT, SCHROYER, COLWILL & BARNETT, P.C.
Pierre Professional Plaza, Suite 201
124 S. Euclid
P.O. Box 1174
Pierre, SD 57501-1174
(605) 224-0461

Counsel for Petitioner
Independent Community
Bankers Association of
South Dakota, Inc.

TABLE OF CONTENTS

Page

Table of Authorities ii

Introductory Comments 1

Reply to Federal Reserve Board Brief 1

Reply to Intervenor's Brief 5

Conclusion 9

TABLE OF AUTHORITIES

Cases: Page

Northeast Bancorp, Inc. v. Board of Governors, 740 F.2d 203 (2d Cir. 1989), aff'd, 472 U.S. 159 (1985) 9

Statutes:

Bank Holding Company Act of 1956, 12 U.S.C. § 1841, et seq. 6

Douglas Amendment, 12 U.S.C. § 1842(d) (1982) ..... passim

McFadden Act, 12 U.S.C. § 36 (1982)..... passim

National Bank Act, 12 U.S.C. % 21 et seq..... 5

No. 87-397

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

INDEPENDENT COMMUNITY BANKERS ASSOCIATION OF SOUTH DAKOTA, INC.,
Petitioner

v.

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent,

and

FIRST CITY BANCORPORATION OF TEXAS, INC.
Respondent-Intervenor.

INTRODUCTORY COMMENTS

This brief is intended as a joint reply to the respective briefs of the other parties.

REPLY TO FEDERAL RESERVE BOARD BRIEF

The Board acknowledges that the de novo national bank established in South Dakota must, under South Dakota law, have only a single office, which office must be located and operated in such a manner that it is "not likely to attract customers from the general public in the state to the substantial detriment of existing banks in the state." (FRB 2) This is significant because there is no provision whatsoever in federal banking law authorizing a state to so condition or restrict the activities of a national bank. This is an unlawful state restriction and conditioning of a national bank's inherent banking functions. That is, the state law impermissibly restricts and prohibits a national bank from freely competing in the marketplace.

Next, the Board notes that, in any event, the national bank is really only contemplating "credit card operations which are directed to customers outside South Dakota." (Ibid.) In other words, the only nexus of the national bank to South Dakota is its charter. This makes a mockery of national banking law.

The Board concludes that, "when the flat prohibition on interstate bank acquisitions is lifted by a state with respect to state banks, the Douglas Amendment itself lifts the prohibition * * * with respect to national banks." (FRB 3) This is not what the Douglas Amendment says. All parties agree that the Douglas Amendment by its first clause prohibits the acquisition of an out-of-state bank holding company of any bank. The second clause of the relevant part of the Douglas Amendment provides that a state may authorize the

acquisition by an out-of-state bank holding company of a "State bank". At the time the Douglas Amendment was adopted, the term "State bank" was expressly defined as meaning a state chartered bank. Both the Board and the Intervenor argue that the Douglas Amendment language authorizing an out-of-state bank holding company to acquire a "State bank" somehow or another automatically includes authorization to acquire a national banking association under the parallel of the McFadden Act. However, even a cursory look at the language of the McFadden Act refutes that contention. The McFadden Act relates to branching. The McFadden Act provides that a national banking association may branch in a state to the same extent that a state authorizes a state bank to branch. There is no such parallel language in the Douglas Amendment. In other words, the Douglas Amendment does not state that if a state authorizes an out-of-state bank holding company to acquire a state bank, then, in that event, the holding company may also acquire a national banking association. Congress chose to limit the Douglas Amendment language to authorization for the acquisition of a "State bank" at a time when the term "State bank" was clearly and definitively defined as being limited to a state chartered bank.

The Board next states that it also found "no merit" in Petitioner's argument that the South Dakota statute conflicts with other "federal banking laws." (FRB 3) However, what could be more of a conflict than for a state, without congressional authorization to prohibit a national bank from competing in the marketplace?

The Board states that in concluding that the South Dakota restrictions do not conflict with federal bank laws, it relied on a previous finding of the Comptroller

of the Currency that the South Dakota statute does not "so restrict the operations of the proposed bank as to be incompatible with the framework of federal law." (Ibid) The Petitioner responds by saying that any such findings or conclusions by either the Board or the Comptroller fly in the face of common sense and the national banking laws. The South Dakota restrictions on the national bank are fundamental violations of a national bank's right and power to freely compete in the marketplace without unauthorized state interference.

The Board points out that the U.S. Court of Appeals for the District of Columbia "did reject the Board's alternative view that the South Dakota restrictions were affirmatively authorized by the Douglas Amendment." (FRB 4, footnote 2) If the South Dakota restrictions were not affirmatively authorized, how can they be implied? There is neither any language in the Douglas Amendment nor any congressional history supporting such implication.

The Board points out that for the past 15 years it has "routinely" approved the acquisition of national banks by out-of-state bank holding companies. (Id., footnote 3) However, what the Board is saying is that those acquisitions have never been challenged.

The Board announces that it is an "authoritative voice on the meaning of a federal banking statutes." (FRB 5) While that may be generally true, it is not an absolute. Again, the fact that the Board's interpretations may be entitled to "substantial deference" does not mean that it cannot be wrong. This is especially so concerning a question of law as opposed to a finding of fact. While courts generally defer to an administrative agency's expertise in fact finding, such deference is not

required as to an issue of law which the court may as readily ascertain.

As a critical point, the Board states that the Douglas Amendment, like the McFadden Act "was intended to promote 'competitive equality' between state and national banks . . ." In other words, the McFadden Act was intended to promote "competitive equality" between state and national banks within a given state. The Board seems to overlook its interpretation of the Douglas Amendment which authorizes a state to restrict and condition a national bank so as to prohibit it from freely competing with other banks within South Dakota. The Board is inconsistent in its argument and application of the McFadden Act and the Douglas Amendment.

The Petitioner argues and contends that the South Dakota restrictions on the national bank destroy "competitive equality" between the national bank and other state and national banks in South Dakota.

It is the Board and the Intervenor whose interpretations would result in state and national banks being treated differently in South Dakota due to the state's prohibitions on free competition on the national bank.

The Board, itself, states the law as follows:

> "A state law affecting the operation of national banks is invalid only if it 'expressly conflicts' with federal law, 'and either frustrates the purpose of such national legislation or impairs the efficiency of (national banks) to discharge the duties, for the performance of which they were created.' "

This is precisely what the South Dakota law does under the Board and Intervenor's interpretation of the Douglas Amendment.

The Board states that the, "Petitioner's reading of

the amendment would divest anyone of power to permit out-of-state bank holding companies to acquire in-state national banks . . ." (FRB 7) The Board seems to forget that it is the Congress which determines if "anyone" should have the power to permit out-of-state bank holding companies to acquire in-state national banks. If Congress had desired to have anyone to have the power to permit out-of-state bank holding companies to acquire in-state national banks, the Congress could have so provided in the Douglas Amendment.

It is said that the comptroller has determined that the choice not to engage in particular activities "is a business decision which does not necessarily result in a course of action incompatible with the National Bank Act or other federal statutes." (FRB 8) However, the choice in the present case is not voluntary. It is the South Dakota statute which prevents the national bank from engaging in its regular and normal banking activities. The bank holding company has no choice.

REPLY TO INTERVENOR'S BRIEF

The Intervenor's brief parallels the Board's brief in many respects. The reply comments above apply equally to the brief of the Intervenor.

The Intervenor states that the Petitioner "chose not to appeal from the (South Dakota) Commission's decision and did not participate at all in the proceedings before the Comptroller." (IB 3) First of all, the Petitioner could not have appealed the South Dakota Commission's decision. It was not final. The Commission's decision was contingent upon approval of the acquisition by the Board of Governors of the Federal Reserve.

Further, as acknowledged by the Intervenor, the Comptroller's decision is likewise contingent upon the

decision of the Board. It is the Board's decision which is paramount and foundational to the others.

Most importantly, we are here dealing strictly with issues of law. The Comptroller had earlier approved Citibank's application for a de novo national bank in South Dakota and had publicly annunciated a policy and philosophy of continuing such approvals. The Petitioner should not have been required to do that which have been fruitless in any event.

The Intervenor continues to attempt to confuse the Court on the issue of bank holding company definition of the term "bank". (IB 4, footnote 5) The term "bank" as presently defined in the Bank Holding Company Act is generic including both state and national banks. However, at the time the Douglas Amendment was adopted the Bank Holding Company Act separately defined the terms "State bank" and "national banking association" for purposes of the Act. The term "State bank" was a term of art specifically defined by the Act as meaning only a state chartered bank. The Douglas Amendment utilized the term "State bank" in its exemption to the blanket prohibition on the acquisition of any "bank" by an out-of-state bank holding company. Thus, the point is that the Congress chose to exempt acquisitions of a "State bank" only.

The statement of the Intervenor that, "neither the language of the Bank Holding Company Act nor the structure of the national banking law supports such an interpretation" does not hold water. The entirety of the limited congressional record on the Douglas Amendment demonstrates that it was based exclusively and entirely upon concepts and principals of states' rights. The law was clear at the time of the adoption of the Douglas Amendment that states could not impair

or regulate national banks. States as recognized in the Respondent's brief are limited to the regulation of State banks, except as authorized by Congress and where the state regulation does not conflict with federal law. A state's restriction or condition as in this case which does not allow a national bank to compete with any bank in South Dakota is a per se conflict with federal banking law which contemplates that a national chartered bank is free to compete as it chooses without state restrictions.

The McFadden Act expressly delegated to the states the right to control branching of national banks. There is a marked difference in allowing a state to control branching of a national bank, as opposed to prohibiting a national bank from freely competing in the marketplace.

The Intervenor supports the Petitioner's argument when it states that it is the "state authority's primary responsibility for supervising State banks." (IB 5)

The Intervenor states that the adoption of the Petitioner's theory would "destroy the legal basis for numerous acquisitions of national banks by out-of-state bank holding companies that the Board has approved to date, including acquisitions under failing bank and reasonable reciprocal statutes." (IB 6-7) It is the Congress which establishes the "legal basis" for such acquisitions and the Board should not be delving into legislative policy. It is the Petitioner's position that the Board in this instance has crossed the line into the legislative arena and thus exceeded its lawfully delegated authority to the extent it has authorized such acquisitions now or in the past without clear statutory guidance. This is not a case where the Board is simply supplying details for a stated congressional policy, for

there is no legislation enacted by Congress clearly pronouncing that the Board may authorize acquisitions in the area of failing banks or regional reciprocal agreements. If Congress wanted to do so, it could readily do so. The fact that these past acquisitions have not been challenged is irrelevant. The Board in actuality is balancing "economic and social concerns" and this type of balancing of interest is "uniquely legislative" and should be left to Congress. If Congress wants to bail out failing banks it could clearly do so by statutory language to that effect. It has not done so. The Board is legislating.

Intervenor states that the Petitioner alleges conflicts between the South Dakota law and "unspecified provisions of the national banking laws" in urging that this Court review this case. (IB 7) The conflict is the fact that the South Dakota law absolutely prohibits a national bank from competing in the marketplace. What could be a more fundamental conflict with federal banking law.

The Board and Intervenor also attempt to confuse the Court by commingling the concepts of restrictions on a bank holding company's right to enter a state, as opposed to restrictions or conditions on the national bank, itself. This case is totally distinguishable from any other case ever decided by any federal appeals court or the U.S. Supreme Court. The issue as agreed by the parties is novel.

Intervenor states that this Court must invalidate both the Board's order and the South Dakota statute in order to hold for the Petitioner (IB 8) This is not at all the case. The Petitioner claims that the Board abused its discretion and acted contrary to law by approving the application in light of the clear conflict of the South

Dakota statute with federal law. The relief sought by the Petitioner is to reverse the action of the Board. The Petitioner does not seek the invalidation of the South Dakota statute. That is not an issue.

The Intervenor referring to the Northeast Bancorporation 472 U.S. 159 (1985), argues that the South Dakota statute fettering a national bank is permissible because this Court has held that the state is to be allowed "flexibility in its approach" concerning the entry of a bank holding company. (IB 8) However, there is as mentioned a difference to be made between a state's conditioning the entry of a bank holding company on the one hand, and placing actual restrictions on a national banking association as in this case on the other.

CONCLUSION

WHEREFORE, the Petitioner respectfully requests that the Court grant certiorari.

Dated this 31st day of December, 1987.

Respectfully submitted,

RONALD G. SCHMIDT
SCHMIDT, SCHROYER, COLWILL & BARNETT, P.C.
Pierre Professional Plaza,
Suite 201
124 S. Euclid
P.O. Box 1174
Pierre, SD 57501-1174
(605) 224-0461